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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1183

LENA L. BUSH, *Petitioner*,

v.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

May it please the Court:

The petition of Lena L. Bush respectfully shows to the Court:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioner, of Brattleboro, Vermont, sued the respondent, an Ohio corporation, in the Vermont State County Court, claiming $5,000 as beneficiary (R. 1) under a certificate issued by respondent insuring her husband, Frank Lee Bush,—

> "for death due to accidental means alone, and independent of all other causes" (R. 40).

The case was removed to the United States District Court for the District of Vermont on the petition of the defendant upon the ground of diversity of citizenship (R. 1).

The trial court granted defendant's motion for a directed verdict interposed at the close of the plaintiff's evidence, and upon the directed verdict judgment was entered (R. 52) which was affirmed by the Circuit Court of Appeals for the Second Circuit by a divided court upon the ground that the quoted provision of the policy was of like effect as though it excluded death occasioned wholly or partly, directly or indirectly, by disease or by bodily infirmity. Circuit Judge Charles E. Clark filed a dissenting opinion (R. 61).

The testimony upon which the plaintiff sought to go to the jury was in brief as follows:

The insured was when he died fifty-six years of age. His health was good and he was strong and active. He had been until the middle of the summer of 1939 employed as a salesman by the Johns Manville Corporation, travelling in Vermont and northern New Hampshire and working long hours, nights and Sundays. He was a sportsman, an active member of a rifle club, always ready to hunt, fish or boat. He had on August 12, 1939, gone from Brattleboro with the petitioner to York Harbor, Maine, for a few days' vacation, staying in a cabin on the seashore about a mile from the Village of York Harbor (R. 2).

Early on the morning of his death, August 16, 1939, he had been fishing with vacation companions who described him as a hale and hearty man to go fishing with, very jovial and lively, with nothing seemingly wrong with him (R. 4-5).

When the party returned at about eight-thirty in the morning, the insured stepped out of the boat at the shore onto smooth and slimy rocks partly covered by about five inches of water, some of the rocks protruding through the water. As he stepped out he slipped or tripped and fell backwards on these rocks. He immediately complained of being a little dizzy and was helped to his cabin by his companions, a distance of about a hundred feet, and then lay

down and rested for a time. Around eleven or eleven-thirty he drove his car with one of his fishing companions about a mile to York Harbor, where his companion went into a store to get things to repair the boat, and when his companion came back in less than ten minutes, the insured was sitting where he had left him, at the wheel of his car, dead (R. 8-11).

Physicians described the condition of his heart and other organs and accounted for the death as follows: The bladder was abnormally small with walls greatly thickened, tough and hard (R. 25); it had been inflamed for a long time and in that condition small pieces would break off which if they got into the veins around the bladder might form clots (R. 28); a clot so formed might be held in place, but if loosened by a fall, would move and if such a clot was moved into a place where it would cut off circulation, it would cause death. The fall had, in the physicians' opinion, moved such an old clot into the *vena cava,* a large vessel leading directly to the auricle of the heart, and it had lodged partly in the auricle and caused death (R. 3). Such a clot described as an old one was found lodged in the auricle of the heart and extending into the inferior *vena cava* (R. 24-25). Such an occurrence is sometimes called an "embolism" (R. 39). The fall had caused the clot to be where its position caused death but was not the cause of the clot forming (R. 3, 28-30).

The case thus presented is one in which "in the common speech of man" the death resulted from the accident.

So far as the jury was informed by the lay witnesses, the facts were that a man in normal health and of robust activity until he suffered a violent fall, immediately thereafter became partially disabled and within a few hours died.

By the expert post mortem observation and opinion, the jury was told that an abnormal condition, the presence in the veins of a formed but stationary clot, had made possible the result, death, and that the probable cause of the existence of the clot was long-standing inflammation of the bladder. There was no intimation in this expert testimony that the mere presence of the clot in the condition and posi-

tion it was and had long been until affected by the accident, would have caused disability or death. If there had been expert opinion indicating pre-existing disability in any degree, it would have been contradicted by the lay testimony of good health and full ability.

Upon such a case, there are several differing judicial views, all supported by substantial authority.

One view is that if pre-existing disability from disease is a factor contributing to the death, to the extent that the accident would not have happened to one free from the disease, or if the accident had happened to one free of the disease the result would not have been death, there can be no recovery on an accident policy, on the ground that the death is not then considered to have occurred "solely" by accidental causes, or "independently" of other causes, as is quite invariably provided in accident policies. This view appears to have controlled the decisions of the Second Circuit before *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

A second and more liberal view is that recovery may be had if the accident causes death even though the accident to a person free from a defect or disability would not have caused death. This ruling is arrived at by reasoning similar to that used in determining the proximate cause in negligence cases, it being held that if the death is the result of the accident with an unbroken chain of causation, then it is the "sole" or "independent" cause. Latent disease not harmful until activated and not inherently progressive, by reason of which the accident results fatally, does not break the chain of causation from the accident to the death.

There is variation of this view, which for convenience may be called a third view, which is that taken by the Vermont courts. It coincides with the view last stated unless the policy contains an additional clause, which many policies in litigation have contained, in effect, that the policy shall not cover loss of life "directly or indirectly, wholly or in part, due to disease or infirmity." According to this

view, if disease or infirmity is indirectly involved, it is held that death is caused wholly and solely by the accident, but because of the additional restrictive clause, recovery is barred by the fact that the death is indirectly or remotely due to disease or infirmity.

What may be called a fourth view is held by courts even more liberal. Whether or not the additional restrictive clause is in the policy, such courts emphasize the fact that no person is wholly free from physical ailment and that accidents and their results are normally contributed to by human imperfections. Under this view if the death is the result of accident "in the common speech of man," recovery may be had on an accident policy even though frailty or infirmity may have caused it or contributed to its dire consequences. This view was well stated by Judge Cardozo in what is perhaps the leading modern case on the subject, *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N. Y. 81, where the policy required not only that the loss be caused "directly and independently of all other causes by accidental means," but also that it was not to cover death "caused wholly or partly by disease or bodily or mental infirmity * * * ".

The Second Circuit decision here under review involves, as above noted, a policy of the more modern and liberal type, which though it insures against death only if it be solely from accidental cause, yet does not contain the additional restrictive clause excluding deaths caused directly or indirectly, wholly or in part, by disease or infirmity. The Circuit Court of Appeals expressly holds that it makes no difference whether or not the policy contains the additional restrictive clause, because in the opinion of the Court a death is not due to accidental means alone, independent or other causes, if it be indirectly or partly occasioned by disease or bodily infirmity. It is immaterial to determine whether such a view is tenable or arguable, but it is directly contrary to the Vermont view.

Sharply differing from the majority opinion below, Circuit Judge Charles E. Clark in his dissenting opinion points out that the Vermont court in *Clark* v. *Employers Liability Assur. Co.*, 72 Vt. 458, distinguishes between policies containing the additional restrictive clause and those which do not.

Judge Clark was of opinion that consistently with the Vermont cases and with Judge Cardozo's approach to the troubled subject in *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N. Y. 81, the plaintiff was entitled to take her case to the jury.

B. JURISDICTIONAL STATEMENT.

This Court may require by certiorari that this cause be certified to it for determination pursuant to the Act of February 13, 1935, c. 229, Sec. 1, 43 Stats. 938, amending and re-enacting Sec. 240 (a) of the Judicial Code, 28 U. S. C. A., Sec. 347. The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 27, 1942 **(R. 26).**

C. THE QUESTIONS PRESENTED.

The questions here presented are:

Did the Circuit Court of Appeals correctly determine and apply the applicable State law?

Under the Vermont law is an accident policy without a clause excluding recovery for death caused "indirectly" by disease as restricted in its benefits as one containing such a clause?

Was there a question of fact to be submitted to the jury?

The petitioner contends that the law relating to accident policies as established in Vermont should have been applied by the Federal courts below,—that under the Vermont rule the evidence required the submission to the jury, under proper instructions, of the question whether the death was by accidental means alone independent of other causes,—that under the Vermont rule if the accident be the proximate cause of the death, the jury may find that the death was

caused directly and wholly by the accident though disease or infirmity contributed indirectly to it,—and that under the Vermont rule an additional clause formerly frequently in policies excluding deaths "directly or indirectly, wholly or in part, due to disease or infirmity," not in the policy here sued on, is necessary to exclude liability where a latent bodily infirmity is an indirect contributing cause or condition involved in the fatality.

D. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, calling for the application of the Vermont State law to a cause in the Federal courts solely by reason of diverse citizenship, has been violated by the opinion and judgment of the Circuit Court of Appeals.

2. Suits on policies of insurance constitute a class of cases in which Federal jurisdiction is frequently and exclusively founded on diverse citizenship, and it is of general importance that the aforesaid principle settled by *Erie Railroad Co.* v. *Tompkins* should be more than merely formally enforced in such cases and not whittled away by a mere casual consideration of the applicable State law. As exemplifying a proper enforcement of the rule, we refer to the opinion of the Circuit Court of Appeals of the Eighth Circuit in *Clay County Cotton Co.* v. *Home Life Ins. Co.,* 113 F. (2d) 856, 859, wherein the Court in a similar accident insurance case arising in Arkansas determined and applied the substantive law involved in a motion to direct a verdict by a consideration exclusively of the Arkansas decisions.

3. Trial by jury has been denied to the plaintiff contrary to the Seventh Amendment to the Constitution of the United States and the principles of the common law.

Wherefore the petitioner prays for the allowance of a writ of certiorari to the United States Court of Appeals for the Second Circuit in the case entitled *Lena L. Bush* v.

The Order of United Commercial Travelers of America, No. 75, October Term, 1941, in order that said case may be reviewed and determined by this Honorable Court.

LENA L. BUSH,

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BRIEF IN SUPPORT OF PETITION.

FORMAL STATEMENT.

This case in the District Court was not reported. In the Circuit Court of Appeals for the Second Circuit, it is reported in 124 F. (2d) Advance Sheets 528.

The grounds of jurisdiction, the statement of the case and the error urged, the grant of respondent's motion for directed verdict, appear in the petition to which this brief is annexed, as does also, in short, the argument of petitioner.

The principal purpose of this brief is to support and illustrate by the adjudicated cases the statements of holdings made in the petition. The following summary presents the topical headings of petitioner's argument:

SUMMARY OF ARGUMENT.

The doctrine of Erie Railroad Co. v. Tompkins requires the determination and application of Vermont law to the question of substantive law arising on the motion for directed verdict.

The Second Circuit decisions adhere to a rule denying recovery on accident policies where disability was an indirect cause.

Other courts of equal standing allow recovery in like cases.

The Vermont rule makes the question turn on the presence or absence of additional provisions in the accident policy expressly excluding recovery where disability is an indirect cause.

The more liberal courts allow recovery in like cases where accident is the proximate cause of death even if such additional provisions are in the policy.

The Court below also misconceived the evidence to conclude that disease was the cause of death.

ARGUMENT.

The Vermont Rule Should Have Been Determined and Applied.

In *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 78, this Court said:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

The doctrine so laid down was immediately applied in two insurance cases, *Ruhlin* v. *New York L. Ins. Co.*, 304 U. S. 202, and *Rosenthal* v. *New York L. Ins. Co.*, 304 U. S. 263, in the latter of which this Court said (p. 264):

> "While respondent contends that the decision below is not in conflict with the local law, it is not necessary for us to determine that question. It is enough to say that the questions to be decided are those of state law and should have been determined according to the decisions of the state court."

In *Clay County Cotton Co.* v. *Home Life Ins. Co.*, 113 F. (2d) 856, the Circuit Court of Appeals for the Eighth Circuit dealt with a suit on an accident insurance policy issued by a New York company to a resident of Arkansas, and in proper compliance with the rule for which we contend (p. 859), determined from an examination of the Arkansas decisions what was the Arkansas rule, and incidentally found it to be strongly for the plaintiff on the point involved in the instant case. The Court said:

> "The Supreme Court of Arkansas has held that an insurance company is liable on its policy of accident insurance if death resulted when it did on account of an aggravation of a disease by accidental injury even though death from the disease might have resulted at a later period regardless of the injury, on the theory that if death would not have occurred when it did but for the injury, the accident was the direct, independent and exclusive cause of death at the time."

The Court said also (p. 861):

> "The appellee contends that in directing a verdict in this case the court was merely applying the procedure of the forum, that the federal decisions and not the law of Arkansas control; or in other words, that the problem presented is one of adjective and not substantive law. The question presented by the motion to direct a verdict was whether a cause of action had been proved, which clearly is a question of substantive law and the state law applied."

In *Harry L. Sheinman & Sons* v. *Scranton Life Ins. Co.*, 125 F. (2d) Advance Sheets 442, the appeal was from the District Court of the United States for the Middle District of Pennsylvania. The insured was a resident of New York. The delivery of the policy was "presumed to have taken place at the residence of the insured". Accordingly it was held that the law governing the interpretation of the contract was that of New York, though matters determinable

by the law of the forum were to be settled by the law of Pennsylvania. The Court said (p. 445):

> "While the meaning of the terms in the contract is to be determined in the instant case according to the law of New York, the legal sufficiency of the evidence to show compliance with the requirements of the contract is to be determined by the law of the forum, federal jurisdiction of the case resting, as it does, upon diversity of citizenship."

In reaching a conclusion that recovery could be had upon an accident policy, though the insured fell in front of a train because of illness, the court relied strongly upon *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N. Y. 81.

The Second Circuit Decisions Deny Recovery on Accident Policies Where Disability Was An Indirect Cause.

The majority opinion below cited three Second Circuit decisions as denying recovery under circumstances resembling those of the case at bar (R. 61).

So cited was *Aetna Life Ins. Co.* v. *Ryan*, 255 Fed. 483, C. C. A. 2d, 1918, where the policy provided payment for death "directly and independently of all other causes, from bodily injuries effected solely through external, violent or accidental means * * *."

The plaintiff claimed the death was from cerebral hemorrhage caused by a blow on the head from a closing subway car door. The defendant claimed that the death was the result of disease, and the autopsy disclosed arteriosclerosis and other ailments as contributory causes. The Court said:

> "The cases establish the principle that, if death results from disease or a bodily infirmity, there can be no recovery under such a policy whether the insured suffered an accident or not. And they also show that there can be no recovery if the insured sustained an accident but at the time it happened was afflicted with a pre-existing disease and if death would not have resulted if he had not had the disease, but his death was caused be-

> cause the accident aggravated the effects of the disease or the disease aggravated the effects of the accident."

Also so cited was *Order of United Commercial Travelers* v. *Nicholson*, 9 F. (2d) 7, C. C. A. 2d, 1925, where the policy sued on insured "against loss of life as the direct and proximate result of, and caused solely and exclusively by, external, violent, and accidental means * * *", and the constitution of the Order provided that accident benefits should not "be payable nor extend to any cause of death or loss of time, where the death or loss of time was contributed to by disease in any degree".

The deceased, about seventy years of age, fell on a stairway and died nine days thereafter from lobular pneumonia. The Court said:

> "To say that the fall caused shock, shock caused lobular pneumonia, and the latter caused death, does not prove the plaintiff's case, even if a jury believed it; for in such a case disease would contribute in some degree to cause death. There is no right of recovery under the contract sued upon if disease contributed in any degree to cause death."

In *Murasky* v. *Commercial Travelers Mut. Acc. Ass'n.*, 94 F. (2d) 578, C. C. A. 2d, 1938, the policy insured against loss of life "caused solely and exclusively by external, violent and accidental means." The deceased died of cerebral hemorrhage three days after an accidental fall which plaintiff claimed was the cause of his death. Multiple neuritis had made him very unstable on his feet and liable to fall. The Court said:

> "The rule has long been established that where preexisting disease causes or contributes in causing death, there can be no recovery and under such circumstances there is no issue for the jury."

To the same effect was the earlier Second Circuit case, cited in the majority opinion below, decided in 1897, *Com-*

mercial Travelers' Mut. Acc. Ass'n. v. *Fulton,* 79 Fed. 423, wherein, however, the policy contained the additional restrictive clause which even in some jurisdictions more liberal than the Second Circuit would have led to a decision for the defendant. The insurance was against death from bodily injury effected through external, violent and accidental means, and the additional clause, frequent in the earlier policies, was that the insurance should not extend to cover death "resulting from or caused directly or indirectly, wholly or in part, by * * * disease in any form."

Other Courts Allow Recovery on Similar Accident Policies Though Disability or Disease Was An Indirect Cause.

In *Scanlon* v. *Metropolitan Life Ins. Co.,* 93 F. (2d) 942, C. C. A. 7th, 1937, the policy provided that the insurance should not "cover accident, injury, disability, death or any other loss caused wholly or partly, directly or indirectly, by disease or bodily or mental infirmity". The insured was injured in an automobile accident on November 7th,—the seventh and eighth ribs on the left side were broken and there was a bruise, black and blue and about the size of the palm of the hand, on the inner part of the upper portion of the left leg. Before the accident he had varicose veins in the area of the leg bruised by the accident. On November 12th the injured portion of the leg became inflamed, but by the 19th the inflamation and soreness had subsided. On the 22nd he was observed gasping for breath and died within fifteen minutes. A post mortem disclosed that the death could have been from either pneumonia or a blood clot causing a "consolidated area" in the lower portion of the left lung. A portion of a blood clot was found near the varicose veins in the bruised area of the left leg, indicating in medical opinion that the other portion of the clot had been broken off and carried through the veins into the inferior vena cava and through the heart into the pulmonary artery and then into the lung where it became stuck and caused death. The Court said:

"While the bodily infirmity need not be the sole cause of the death to defeat recovery under this policy, it is well settled that the 'cause' as here used, either sole or partial, refers to something different than a disease or affliction rendered more serious by the consequences of the accident.

"One may recover on an accident policy such as here in issue although the insured suffers from bodily infirmities. If the accident brought about conditions from which death resulted, the fact that the insured was ill, aged or infirm, or had bodily or mental infirmities, would not bar recovery provided the accident excited the bodily infirmity into activity and death resulted. If the infirmity alone would not have caused death, it cannot be said to have caused death when the immediate result was occasioned by an infirmity which became active only because of the accident. The infirmity may have made the insured less able to resist, but if the accident caused the condition which in turn affected the weak spot which did not resist as well as a healthy body, the cause is nevertheless the accident, and recovery cannot be avoided or evaded." (citing many cases, including *Manufacturer's Acc. Ind. Co.* v. *Dorgan,* 58 Fed. 945 *infra,* p. 21.)

In *Nelson* v. *Businessmen's Ass. Co. of America,* 108 F. (2d) 363, C. C. A. 7th, 1939, the policy insured against loss resulting solely from bodily injury effected directly and independently of all other causes by accidental means. The insured lifting a heavy weight in his home struck the right side of his abdomen against a door jamb on May 16th. Illness followed. The following day he was operated on and found to have a ruptured gall bladder and he died on May 23rd of peritonitis. His gall bladder was friable, several stones were imbedded in the wall of it and when he was operated on there was considerable bile in the abdomen. The medical testimony for the plaintiff was that a person with a gall bladder so infected might live on indefinitely and die from other causes, and that the lifting of the heavy weight or the falling against the door jamb either or both might or could have brought about the condition resulting in his

death. Plaintiff's physician stated, however, that the diseased condition of the gall bladder contributed to the rupture of it. After quoting the above-quoted passage from *Scanlon* v. *Metropolitan Life Ins. Co.*, the Court held that the jury might have reasonably found that Nelson's death resulted from bodily injuries directly and independently of all other causes through accidental means. An instructed verdict and judgment for the defendant was therefore reversed and the cause remanded for trial.

In *Commercial Casualty Ins. Co.* v. *Stinson*, 111 F. (2d) 63, C. C. A. 6th, the risk insured against was "loss resulting directly and independently of all other causes, from accidental bodily injury fatally or non-fatally", and there was an exclusion of "any accidental bodily injury caused or contributed to directly or indirectly by sickness or disease." The insured on Christmas Eve had had two drinks in the afternoon and was attempting to visit near neighbors when he fell on icy cement steps and thereafter behaved violently and irrationally, whether by reason of a blow on his head or from alcohol there was a conflict in the testimony. He was given morphine, lapsed into a coma and died the following morning. The expert testimony as to whether death was due to acute alcoholism or to trauma to the brain was conflicting. The Court said:

> "The policy in question would be of little value to the insured if its language be literally interpreted as appellant insists.
>
> "* * * An injury which might naturally produce death in a person in a certain physical or mental state of health is the cause of his death if he dies because of it, even if he would not have died if his physical and mental condition had been different. The question as to whether the excessive use of alcohol is to be deemed the proximate cause of insured's death within the meaning of the policy so as to prevent a recovery depends upon whether it was the direct cause of his death. However, if owing to the weakened condition of the brain membranes from the excessive use of alcohol, the fall accentuated the brain hemorrhages to the extent of cir-

culatory collapse causing death, the appellant would be liable under contract although, if the insured had been normal, the fall would not have caused such a result."

In *Massachusetts Protective Ass'n.* v. *Lewis,* 72 F. (2d) 952, C. C. A. 3d, decided in 1933, the policy insured "against loss resulting from bodily injuries effected directly and independently of all other causes by accidental means * * * and due solely to external, violent and involuntary causes," but it did not insure against "death due to disease, whether accidental or otherwise." The insured, while bathing in a lake, dived, struck his head on the bottom and broke off a tooth, and, according to medical testimony, thereby disseminated into his system streptococcic germs which were at the root of the tooth. The Court said:

> "In the case at bar, the insured was in normal and good health, not only doing his work daily without difficulty, but taking part in sports and athletics, swimming, golf, etc. He had streptococcic germs at the root of a tooth, as the evidence shows, but they were apparently walled-in or confined, and not doing any perceptible harm to him. * * * There are perhaps always germs of one kind or another in our body, confined, quiescent, and impotent, and may always remain so, but they are there, and we are apparently in perfect health. The presence of these germs in an apparently normal and healthy body is not a 'disease' within the meaning of the policy. The policy does not provide that a body must be perfectly sound, free from every germ and defect, but it simply provides that it 'does not cover death due to disease,' such as those mentioned in the cases cited. Consequently the insured died as a result of bodily injuries directly and independently of all other causes by accidental means."

The Vermont Rule Allows Recovery Where Disability or Disease is An Indirect Contributing Cause in the Absence of Additional Provisions in the Policy Expressly Excluding Recovery in Such Case.

In *Corsones Admr.* v. *Monarch Acc. Ins. Co.*, 103 Vt. 379, decided in 1931, the policy insured against "loss of life resulting directly and independently of all other causes from bodily injuries effected solely through accidental means." The insured while about his occupation as a waiter in a restaurant suffered a traumatic hernia as the result of a fall. He was operated on, acute dilation of the stomach set in, and he died three weeks after the accident. The Court said:

> "The plaintiff's evidence tended to show that the hernia was caused by the fall, that is, by accidental means. Under these circumstances the death was attributable to the accident and not the hernia, which was not a new and independent cause of death, but merely a link in the chain of causation between the accident and the death.
>
> "The defendant relies upon Anderson v. Great Eastern Casualty Co., 51 Utah 78, 168 Pac. 966, L. R. A. 1918 B, 1194, wherein the policy provided that 'any loss resulting wholly or in part, directly or indirectly, from * * * blood poison * * *' shall be considered as resulting from sickness and covered only by a section of the policy providing for sickness indemnity. The insured sprained his ankle; blood poison set it and he died. It was held by a divided court that, under the clause above quoted, no recovery could be had for the loss of life. But the language of the policy was of wider application than that in question in the instant case."

In *Griswold* v. *Metropolitan Life Ins. Co.*, 107 Vt. 367, decided in 1935, the policy insured against "the results of bodily injuries * * * caused directly and independently of all other causes by violent and accidental means."

The insured was chopping wood. A stick flew up and made an abrasion of the skin sufficient to cause bleeding at the base of the nose. This was Friday, April 28th. By the

next Tuesday swelling appeared, and he died of septicaemia May 10th. The principal matter discussed was whether the voluntary act of chopping wood with the unexpected result was death from accidental means alone and independent of all other causes.

This case should not be discarded as unimportant as casually as is done in the majority opinion (R. 60). The Vermont Court discussed the differing authorities at length and certainly indicated that accident insurance policies are in that State to be construed strongly against their draftsmen, the companies. Consistently with its view (and Judge Cardozo's), the Vermont Court differs with the majority opinion of this Court denying liability in the sunstroke case, *Landress* v. *Phoenix Mutual Life Ins. Co.*, 291 U. S. 491 (and see to the same effect Judge Clark in the footnote to his dissenting opinion below, R. 61).

The Vermont Court quoted from Judge Cardozo's opinion in *Lewis* v. *Ocean Acc. & Guarantee Corp.*, 224 N. Y. 18, 7 A. L. R. 1129, where Halsbury, Ld. Ch., is quoted as saying "Probably it is true to say that in the strictest sense, and dealing with the region of physical nature, there is no such thing as an accident." Judge Cardozo's opinion continues "But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the average man. * * * Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident. This test—the one that is applied in the common speech of men—is also the test to be applied by courts." The Vermont opinion then states:

> "This was a reasonable mode of interpretation. Uncertainty in the significance of a term is to be resolved in favor of the insured and against the company. Stanyan v. Security Mutual Life Ins. Co., 91 Vt. 83, 86, L. R. A. 1917 C, 350 * * *. If the insurer wished that the terms 'accident' and 'accidental means' should have different meanings, the contract of insurance

should give the insured warning of that fact. Travelers' Protective Ass'n. v. Stephens, 185 Ark. 126, 49 S. W. (2d) 364, 366."

In *Clark* v. *Employers Liability Insurance Co.*, 72 Vt. 458, the policy insured against death caused solely by accident independently of other causes and also provided that there should be no recovery if the death was occasioned wholly or partly, directly or indirectly, by disease or bodily infirmity. The insured was run over and the evidence presented a question of fact whether he had been stricken with apoplexy and fell in a place where the wheels passed over him, or whether he accidentally fell where the wheels passed over him and suffered apoplexy as the result of the injuries received. The Court said:

"The defendant contends that if the insured fell before the wheels because of an apoplectic fit, not sufficient to cause death, and was killed by the pressure of the wheels, it might truly be said that his death was caused directly and wholly by the accident, and yet the case be within the exception of the policy. A few authorities are referred to in elucidation of this claim.

"In *Winspear* v. *The Accidental Insurance Co.*, 6 Q. B. Div. 42, and in *Lawrence* v. *Accidental Insurance Co.*, 7 Q. B. Div. 216, the company was held liable for accidental deaths which would not have occurred but for fits of apoplexy. But the exceptions in the policies there construed did not contain the word 'indirectly' nor an equivalent expression, and the reasoning advanced in support of the decisions indicates that if there had been such a provision the result would have been different.

"In *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 7 C. C. A. 541, the facts presented the same situation, and the policy was like the one in suit; and upon a review of the cases above cited, it was considered that the word 'indirectly' broadened the exception and required a different conclusion.

"We think the view of the Circuit Court of Appeals is correct. The policy does not insure against an accidental death which is caused indirectly by disease. If

the insured's fall was caused by disease, that disease was the cause of his death within the meaning of the exception. His helpless plight in the tracks of the approaching wheel was due to the apoplectic stroke, and to that alone. An accidental death by crushing is caused indirectly by disease, if the person falls in the place of danger because of disease. The death is caused directly and wholly by the crushing but it is nevertheless caused indirectly by the disease. It was necessary for the plaintiff to show, not only that the injury received was the direct cause of death, but that disease did not indirectly cause the death by subjecting the insured to that injury. The charge failed to present this view to the jury."

We call attention particularly to the statement of the Vermont court that its view coincides with the view of the Circuit Court of Appeals in *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 7 C. C. A. 541. In this case, reported also in 58 Fed. 945, decided by the Circuit Court of Appeals for the Sixth Circuit in 1893, the then Circuit Judge Taft delivered the opinion of the court. The application and policy provided that there should be no recovery except when the accidental injury shall be the proximate and sole cause of disability or death, and also that the insurance did not extend to any injury "happening, directly or indirectly, in consequence of disease, or to death or disability caused wholly or in part by bodily infirmities or disease".

The insured was found dead lying in a brook with his face submerged in six inches of water. The bank was about eighteen inches above the water and there were in the water stones upon which he might have struck his head. There were two bruises on his forehead. The jury made special findings to the effect that the death was occasioned solely by accident, that he was unconscious at the time his body entered the brook, and that his unconsciousness was occasioned by some temporary affliction. Error was assigned upon the refusal of the court to set aside the verdict for the plaintiff on the ground that the special findings could not sustain their general verdict.

Referring first to the policy clause to the effect that the accidental injury must be the proximate and sole cause of the death, Judge Taft said:

> "We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause.
>
> "In Winspear v. Insurance Co., 6 Q. B. Div. 42, the terms of the policy provided 'that it should cover any personal injury caused by accidental, external, and visible means, if the direct effect of such injury should occasion his death; and it provided, further, that it should not extend to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease.' The insured was seized with an epileptic fit and fell into a stream, and was there drowned while suffering from a fit. It was held that the death was within the risk covered by the policy, and that the proviso did not apply.
>
> "In Lawrence v. Insurance Co., 7 Q. B. Div. 216, the policy provided:
>
> > 'This policy covers injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of the death to the insured, but it does not insure in case of death arising from fits, * * * or any disease whatsoever, arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly, or jointly with such accidental injury.'
>
> "The insured, while at a railway station, was seized with a fit, and fell forward off the platform across the railway, when an engine and carriages which were passing went over his body, and killed him. It was held

that 'the death of the insured was caused by an accident, within the meaning of the policy, and that the insurers were liable.'

"Mr. Justice Watkin Williams said in this case:

> 'The true meaning of this proviso is that, if the death arose from a fit, the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause, in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation.'

"After giving some illustrations, the learned justice continued:

> 'I therefore put my decision on the broad ground that, according to the true construction of this policy and this proviso, this was not an act arising from a fit, and therefore whether it contributed directly or indirectly, or by any other mode, to the happening of the subsequent accident, seems to me wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff.'

"These cases are referred to with approval by Mr. Justice Gray in delivering the opinion of the supreme court in case of Insurance Co. v. Crandal, 120 U. S. 527-532, 7 Sup. Ct. 685. They sufficiently establish the proposition that, if the deceased in this case died by drowning, then drowning was in law the sole and proximate cause of the disability of death."

Having disposed of the provision in the policy which appears also in the policy in the case at bar, Judge Taft then discussed the effect of the additional provision in the policy there in suit excluding recovery for the direct or indirect consequence of disease. In disposing of this issue Judge Taft said:

> "We now proceed to inquire whether, if the fall of the deceased into the water was caused by fits, vertigo, or any disease, such accidental death could be said, within the meaning of the policy, to have been 'caused directly or indirectly, wholly or in part, by or in consequence of such fits, vertigo, or disease.' In our opinion the adjective 'accidental' qualifies not only 'injuries,' but also 'death,' and therefore an accidental death by drowning does result from, and is caused indirectly by, fits, vertigo, or other disease, if the fall into the water, from which drowning ensues, is caused by such disease. The exception is broader than the exceptions in the policies considered in the Winspear and the Lawrence Cases, and is made so by the use of the word 'indirectly.' As can be seen from the words of Mr. Justice Williams quoted above in the Lawrence Case, if that policy had provided that it should not apply to an accident to which a fit contributed indirectly, the company would not, in his opinion, have been liable."

It is clear that the rule as so expounded by Judge Taft would deny or permit recovery dependent on the presence or absence of the additional restrictive clause excluding death caused "indirectly" by disease. It is clear that Vermont in the *Clark* case approved the rule so expounded (*supra* p. 20). It is clear that the majority opinion below rejected it (R. 60), and misinterpreted the Clark case. Dissenting Judge Clark so held (R. 62).

This Court in *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527, 532 (cited by Judge Taft, *supra*, p. 23), a case of suicide by hanging while insane, permitted recovery upon an accident policy, citing the two English cases above discussed in support of the following statement:

> "If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether, under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or anything but the act of hanging himself could be held to be the cause of his death."

Decisions from sundry jurisdictions as to the effect of pre-existing physical condition in liability under accident

policies are collected in an annotation in 131 A. L. R. at page 240 *et seq.* The presence or absence of an additional clause excluding liability where disease or infirmity is partly or indirectly a contributing cause is so frequently regarded as determinative that the cases collected in the note are classified with reference to the presence or absence of such additional provision.

More Liberal Courts Allow Recovery Where Latent Disease is Activated by Accident Even Though Policy Excludes Recovery for Death Indirectly or Partly from Disease.

Scanlon v. *Metropolitan Life Ins. Co.*, 93 F. (2d) 942, above discussed (p. 14), was such a case.

In *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N. Y. 81, the policy insured against death "caused directly and independently of all other causes by accidental means" and also provided it was not to cover death "caused wholly or partly by disease or bodily infirmity." The facts appear in the quotation from the case in the opinion below (R. 58). Closely following the reasoning of his prior opinion in *Lewis* v. *Ocean Acc. & Guarantee Co.*, 224 N. Y. 18, quoted with approval in the Vermont case of *Griswold* v. *Metropolitan Life Ins. Co.*, 107 Vt. 367, *supra*, p. 9, Judge Cardozo said:

> "The infinite interplay of causes makes it impossible to segregate any single cause as operative at any time and place to the exclusion of all others, if cause is to be viewed as a concept of science or philosophy."

Consistently with the discard of the scientific approach as unreasonable for application to accident policies, which approach would couple results with their remote causes, Judge Cardozo finds no more obstacle to recovery in the clause excluding recovery for death "partly" by disease, than in the oft-used phrase "independently of all other causes by accidental means." He discards as a cause a "condition abnormal or unsound when tested by a standard of perfection, yet so remote in its potential mischief that common speech would call it not disease or infirmity, but at most a

predisposing tendency. * * * An ulcer as trivial and benign as an unaffected pimple is at most a tendency to an infirmity, and not an infirmity itself."

The Court Below Also Misconceived the Evidence to Conclude that Disease Was the Cause of Death.

Commenting on the opinion of Judge Cardozo in *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N. Y. 81, the majority opinion below first implies disagreement with the statement that a duodenal ulcer can properly be regarded as trivial and benign. The indication of disagreement is as plain as though it were directly stated (R. 59). The opinion then states that Judge Cardozo's conclusion was based upon the assumption that such an ulcer had not given rise to a disease in any practical sense, and then the opinion distinguishes the present case as involving a more serious condition of a blood clot "in a vein leading to the heart". Since all veins lead to the heart, this might be construed as accurate, but the opinion then refers to the location of the clot prior to the accident as having been the *vena cava.* This is plainly an assumption of fact not justified by the evidence here. The testimony tended to prove that this clot had been for a long time held in place, probably in the veins around the bladder (R. 28, 29), and there was no basis in the evidence for a belief that the clot had moved into the *vena cava* before the fall (R. 30, 3).

As dissenting Circuit Judge Clark well said (R. 61), "The medical evidence showed that the ante-mortem clot 'had been there for some time'; and in the posture of the case as it was when it was taken from the jury, they might reasonably have found that, but for the fall, the deceased would have continued to live indefinitely."

Further to distinguish the *Silverstein* case, the majority opinion below points out that clots are notoriously and frequently the causes of death (R. 59), but we submit the same could be said of duodenal ulcers. Clots become causes of death when they move intact into vital spots, and duodenal

ulcers when they perforate the duodenum. There is no difference in principle.

Comment on the majority opinion may well be concluded by quotation from Circuit Judge Clark's dissent (R. 61-62):

> "Hence the fall is—in Justice Cardozo's felicitous phrase—'an accident in the common speech of men'; and purchasers of accident insurance would hardly expect that latent heart trouble, unknown to anyone and only to be brought out by an accident, would be a complete bar as a matter of law. The logic of this conclusion must apply inevitably to all conditions contributing to death, such as ulcers, whether benign or malignant, or even nearsightedness which might have caused a fall leading to death.
>
> • • • • • • • • • •
>
> "In view of the Vermont court's adherence to the rule of liberal construction of insurance policies (citing the Corsones and Griswold cases, supra), the beneficiary should have the benefit of any doubt here, at least to take her case to the jury, who may, of course, find the death not due to accidental means. After all, it was the insurance company which chose not to sell the more restricted form of policy."

Respectfully submitted,

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(14)

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IN THE

Supreme Court of the United States

October Term, 1941.

No. 1183.

LENA L. BUSH,
Petitioner,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,
Respondent.

BRIEF OF RESPONDENT, CONTRA, PETITION FOR WRIT OF CERTIORARI.

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The statement of matter involved is fairly set forth in the petition for writ of certiorari and the main issue raised in this case refers to the liability of the respondent

where the facts show that a pre-existing diseased condition was aggravated by the effects of an accident and the combination of the two resulted in death.

The contractual provision is as follows:

> "* * * the results of bodily injury * * * effected solely through external, violent and accidental means, * * * which shall be occasioned by the said accident alone and independent of all other causes."

There can be no question but that the rule in the Second Circuit prior to the Supreme Court's decision in Erie R. R. Co. v. Tompkins, 304 U. S., 64, was to the effect that under such circumstances there was no liability. Aetna Life Ins. Co. v. Ryan, 255 Fed., 483; Order of The United Commercial Travelers v. Nicholson, 9 Fed. (2), 7 (C. C. A. 2); Commercial Travelers Mutual Accident Ass'n. v. Fulton, 79 Fed., 423 (C. C. A. 2). The Circuit Court of Appeals looked to the laws of Vermont and determined that, in the case of Clark v. Employer's Liability Assurance Co., 72 Vt., 458, 48 Atl., 639, the law of Vermont was similar to the law as previously expressed by the Second Circuit and affirmed the action of the court below in directing a verdict for respondent at close of the testimony offered by petitioner.

The petitioner claims that because the word "indirectly" was used in the policy involved in the Clark case and because the English cases cited in the Clark case did not contain the "indirect" provision, that if the Supreme Court of Vermont was confronted with a contract such as involved in the instant case, that court would hold, contrary to the decision in the Clark case, that the company was liable.

In the majority opinion below, in commenting on this phase of the matter, the court said:

> "It is argued that the Clark decision differs because the word 'indirectly' used in the policy there was broader than the words 'due to accidental means alone and independent of all other causes.' We can see no practical difference and regard the Clark decision as directly in favor of the defendant's position."

The so-called "redundant clause" was specifically held as surplusage and unnecessary in the cases of Crandall v. Continental Casualty Co., 179 Ill. App., 330, and Penn v. Standard Life and Accident Insurance Co., 158 N. C., 29, 73 S. E., 99 (on rehearing, 76 S. E., 262). In the Crandall case the court, in considering this question, said:

> "In considering the various cases arising on accident insurance contracts containing similar provisions, we must bear in mind that the policy under consideration here is not one with the general undertaking to answer in case of * * * death from accidental causes, with a clause excepting specific causes and thus limiting the general liability * * *. There are * * * cases where the undertaking is limited, as in this case, by its own terms as first stated, yet followed by exceptions of specified causes, that, without such express exceptions, could not have fallen within the stipulated undertaking to pay. This form of policy seems to have been quite usual in the time of the earlier cases and less common in later years. We see no difference in construction of an insurance contract where the undertaking is as first stated clearly to answer only for death from some limited cause or causes, whether it is followed by express exceptions of some cause not there included, or not. If the stipulation be to pay in case of death from poison, it is immaterial whether or not it be followed

by an express provision that the insurer will not be liable in case of death from some other specified cause. The plaintiff must aver and prove death from poison. Yet, in discussing cases containing such useless exceptions, the courts have often naturally referred to them as express provisions that the insurer would not be liable in such event. The legal effect of the policy is the same whether the redundant provision is present or not."

Vermont Has Not Passed Upon This Question.

Three Vermont cases (Corsones v. Monarch Ins. Co., 103 Vt., 379, 154 Atl., 693; Griswold v. Metropolitan Life Ins. Co., 107 Vt., 367, 180 Atl., 649, and Clark v. Employers' Liability Assurance Co., supra), are cited in the brief of the petitioner and in the decision of the Circuit Court of Appeals bearing upon this question. Neither the Corsones nor the Griswold case have any bearing upon the question at bar. In the Corsones case the accident caused a disease or condition which had not existed before which disease or condition caused the death. As the Court of Appeals stated in commenting upon this case:

> "It might have been different if the fall had aggravated a pre-existing hernia and the hernia had together effected the death of the insured."

In the Griswold case the deceased was hit by a piece of wood and in turn septic infection developed which caused his death. As the Court of Appeals stated:

> "The infection did not precede the accident but was set up by it."

Both of these cases, therefore, are simply a recognition of the well established rule that where an accident causes a disease and the disease causes death, such death is the result of accidental means alone and independent of all other causes.

The Clark case, as stated above, holds that, under a contract, as contained in the instant case, with the addition of the so-called "redundant clause," there can be no liability under the facts as presented in the case at bar. The Circuit Court of Appeals could see no practical difference between the instant case and the Clark case. But if the Clark case is not an authority for the respondent then neither is it authority in favor of the petitioner and in such a case the law previously laid down in the Circuit Court will control. Thus, in the very recent case of The Order of United Commercial Travelers of America v. Sevier, 121 Fed. (2), 650, it was held that where neither Missouri nor Ohio had construed the particular provision of a contract the federal court would exercise its own judgment. See also Ins. Co. v. Bowman, 99 Fed. (2), 856. And in the case of Bowen v. N. Y. Life Ins. Co., 33 Fed. (S), 705, aff. 117 Fed. (2), 298, Cert. Den. 313 U. S., 583, it was held that the federal court sitting in Missouri was required to apply pertinent rulings, if any, of the courts of Missouri but that if there was no Missouri authority on the subject involved, the law as announced by the Federal Circuit Court of Appeals for that circuit would control.

The Law of the State of Incorporation Is Applicable.

The respondent is a fraternal beneficiary society (P. Ex. 5 (C.), R. 42) incorporated under the laws of the state of Ohio (P. Ex. 5 (1) R. 40) and, therefore, the rights of the members and their beneficiaries are to be determined according to the laws of Ohio.

Supreme Council Royal Arcanum v. Green, 237 U. S., 531, 59 L. Ed., 1089;
Modern Woodmen of America v. Mixer, 267 U. S., 544, 69 L. Ed., 783;
Van De Water v. United Commercial Travelers, 77 Fed. (2), 331, 7 Fed. (S.), 369;
Woodmen of the World v. Bolin, 305 U. S., 66, 83 L. Ed., 45.

The last act necessary to consummate this contract and make it binding between the parties took place at Columbus, Ohio, at 12 o'clock noon on the day the certificate was dated, no delivery of certificate to the insured being necessary in order to make a binding contract (P. Ex. 5 (1), R. 40-41). The court's attention is directed to the fact that the certificate sued upon in this case was executed at Columbus, Ohio, March 23, 1933, and by its terms took effect "at twelve o'clock noon, standard time, on the day this certificate is dated * * *." The last act necessary to bring the contract into effect, therefore, took place in Columbus, Ohio, on March 23, 1933, and under the recognized and uniform decisions of this court the

contract is to be construed according to the place where the contract is made.

Ruhlin v. New York Life Ins. Co., 106 Fed. (2), 921, Cert. Den. 60 S. Ct., 469;
Northwestern Mutual Life Ins. Co. v. McCue, 223 U. S., 234, 56 L. Ed., 419;
Oliver v. Iowa State Traveling Men's Ass'n., 76 Fed. (2), 963, Cert. Den. 296 U. S., 582, 80 L. Ed., 412.

THE LAW OF OHIO.

The Ohio situation is comparable to that in Vermont to the extent that in three cases the court had before it contracts containing the "redundant" clause.

Aetna Life Ins. Co. v. Dorney, 68 Ohio St., 151, 27 N. E., 254;
Railway Mail Association v. Weir, 156 N. E., 921, and
Hull v. Metropolitan Life Insurance Co., 36 N. E. (2), 866.

In the Dorney case, supra, the trial court refused to give the following instruction:

> "If you find from the facts and circumstances proved that the coats of the stomach of the said Dorney had been eaten through by an ulcer and was left in a weakened and diseased condition and that but for such diseased and weakened condition of his stomach the injury which caused his death would not have resulted from anything he did on October 23, 1933, then and in that case the plaintiff cannot recover and the verdict must be for the defendant."

In the opinion the Supreme Court said:

> "The instruction requested was pertinent in view of the stipulations of the policy, the issues of fact

made by pleadings, and the evidence offered by the plaintiff below."

And in the Weir case, supra, the court said on page 923:

"The Supreme Court of Ohio in Aetna Life Ins. Co. v. Dorney, 68 Ohio St., 151, 27 N. E., 254, holds that no recovery could be had on an accident policy where a pre-existing disease had contributed to the death * * *. In the case of Western Commercial Travelers' Ass'n. v. Smith, 85 F., 401, 40 L. R. A., 653, the United States Circuit Court of Appeals of the Eighth District laid down the rule as follows:

'If the deceased suffered an accident, but at the time he sustained it he was already suffering from a disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected by the disease or infirmity, but he died because the accident aggravated the disease, or the disease aggravated the effects of the accident, as in the case of the insured who was subject to such a bodily infirmity that a short run, followed by stooping, which would not have injured a healthy man, produced apoplexy (Insurance Co. v. Selden, 24 C. C. A., 92, 78 F., 285), the association was exempt from liability because the death was caused partly by disease and partly by accident.'"

However, in Rheinheimer v. Aetna Life Ins. Co., 77 Ohio St., 360, 83 N. E., 491, the Supreme Court of Ohio quite clearly and unequivocably stated that the "indirect" clause was redundant. The contractual provision in the Rheinheimer case was substantially similar to the provision found in the Clark case, supra, for after setting forth the usual insuring clause providing for indemnity for "death resulting solely from bodily injury effected through external, violent and accidental means," the

policy contained the further provision that "this insurance does not cover in event of accident or death, resulting wholly or partly, directly or indirectly, from bodily or mental infirmity, or disease in any form, proximate or contributory, as a primary, secondary or final cause of accident, injury, disability or death."

In discussing this "disease" clause above quoted, the court, on page 381, said:

> "These words are literally taken from the clause of the policy quoted, and we know of no rule that requires the court to charge a proposition as law, which is contained in the technical language of the contract. The court, in charges given, had stripped from the real issue some of these qualifying words which to the jury might seem mysterious, and which might even confound them, and gave their support and meaning in clear and simple terms. **For if the accident was the sole cause of death, and it was so caused independently of any other cause, then it did not result partly from any other cause, and if the accident was the sole and proximate cause of death, then it did not result, directly or indirectly, from any other cause.** And if the accident was the sole and proximate cause, it was the primary, and not the secondary or contributory cause. It seems to us the above special instructions given at the defendant's request, and the general charge, covered the terms of the exception in the policy, and the court sufficiently and correctly construed the policy. **The qualifying words, above noted, were contained, in whole or in part, in several of the rejected instructions, and the same comment applies to them."**

Case Involves No Question of General Public Interest.

The affidavit of the supreme secretary of the respondent association, filed herein with this brief, shows that there are issued and outstanding in the state of Vermont but 363 contracts of insurance to members of this association. In view of this situation, it can hardly be said that this case involves any question of general public interest.

Again, it is quite apparent that the petitioner is not seeking to have this court lay down any broad rule of law for future guidance but rather is asking this court to review the decision of the Circuit Court of Appeals in determining what constitutes the law of Vermont—or, more correctly, what might constitute the law of Vermont in the event a case similar to this one were presented to the highest court of that state.

It is respectfully submitted that the petition for writ of certiorari should be denied.

RICHARD T. RECTOR,
50 E. Broad St., Columbus, Ohio,
E. W. DILLON,
632 N. Park St., Columbus, Ohio,
Attorney for Respondent.

APPENDIX.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1941.

No. 1183.

LENA L. BUSH,

Petitioner,

vs.

THE ORDER OF UNITED COMMERCIAL TRAVELERS OF AMERICA,

Respondent.

AFFIDAVIT.

State of Ohio, County of Franklin, ss.:

A. W. Franklin being first duly sworn says that he is the supreme secretary of The Order of United Commercial Travelers of America, is the respondent above, and as such has charge and control over all records of said order.

Affiant further says that as of March 31, 1942, the order had three hundred and sixty-three (363) members residing in the state of Vermont who were holders of accident insurance certificates.

Further, affiant sayeth not.

A. W. Franklin.

Sworn to and subscribed before me this eighteenth day of May, 1942.

Lloyd Weeks,
Notary Public, Franklin County, Ohio.

My commission expires August 24, 1943.